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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-394

UNITED STATES OF AMERICA, *Petitioner*,

vs.

L. O. WARD d/b/a L. O. WARD OIL AND GAS OPERATIONS.
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT L. O. WARD

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT L. O. WARD

NOTICE

Pursuant to the command of Supreme Court Rule 40(3), this brief omits references to the reports of the opinions below, a statement of the grounds of jurisdiction of this Court, a recitation of the Constitutional and Statutory provisions which this case involves, and the question presented for review, because the Respondent is satisfied with the accuracy of the statements in Petitioner's brief on those subjects.

STATEMENT

Ward does not disagree with the summary of material facts set forth in the Government's Brief on pages 5 through 12, for there is no factual dispute; a facility owned and operated by Ward, a sole proprietor,[1] sustained a small oil spill; the oil ran into a navigable stream as defined by Congress; Ward reported the spill as required by law; failure to have reported the spill is a criminal offense; once the spill was reported, the Coast Guard, pursuant to authority, imposed a $500.00 fine on Ward based entirely upon facts that Ward himself had been compelled to report or face criminal prosecution for failure to report; Ward challenged the imposition of the fine on the grounds that it violated his Fifth Amendment rights against self-incrimination; his administrative appeals were denied and after exhaustion of administrative remedies, he resisted the fine in a collection action in the District Court; the District Court ruled against him on his constitutional claim, but after jury trial, reduced the "civil penalty" to $250.00 because of his prompt and effective clean-up methods; Ward appealed and the Court of Appeals reversed, holding that the Government could not impose a "civil penalty" against Ward on an oil spill based upon information Ward himself was compelled to provide; this Court granted certiorari.

An analysis of the penalty phases and schemes of the Act denominated both civil and criminal is necessary, however, to understand that beyond any question the provision involved here is a "criminal penalty" or a "criminal

1. Since a corporation does not have a Fifth Amendment privilege against self-incrimination, *California Bankers Assn. v. Schultz*, 416 U.S. 21, 71 (1974), a corporate owner as operator of a facility that sustained a spill is not directly affected by the Court of Appeal's decision. *United States v. Allred Towing Corp.*, 578 F.2d 978 (4th Cir. 1978). Most oil spills are from corporate owners. See Petition for Certiorari, pp. 12-13.

case" for purposes of the Fifth Amendment self-incrimination clause.

Simply put, the statutory scheme is:

1. Section 311(b)(3) prohibits an oil spill into navigable waters of the United States;

2. Section 311(b)(5) requires the owner or operator of a facility wherein such a spill has occurred to report such spill immediately to an appropriate agency of the United States Government;

3. Failure to report the spill is a criminal offense punishable by a fine up to $10,000.00 and imprisonment for one year;

4. No notification received pursuant to Section 311(b)(5) shall be used against any person in any criminal case except for a perjury or false statement prosecution;

5. The owner or operator of a facility from which oil has been discharged shall be assessed a "civil penalty" by the Government in an amount not to exceed $5,000.00;[2]

6. In determining the amount of the penalty the Government (Coast Guard) is authorized to take into consideration the size of the business of the owner or operator charged, the effect on the owner or operator's ability to continue in business, and the gravity of the violation (A 39-40);

7. The Government is authorized to remove or arrange for the removal of any oil discharged into the navigable waters of the United States unless the Gov-

2. The penalty now may be as high as $50,000.00 under the provision of the Federal Water Pollution Act of 1978, Pub. L. No. 95-576, 92 Stat. 2468. The same three factors used by the Coast Guard to assess the amount of the penalty remain operative. Additionally, the penalty may be assessed as high as $250,000.00 for willful negligence or misconduct.

ernment is satisfied that the owner-operator of the facility from which the substance was discharged will properly do so. The Government's clean-up costs are paid out of a special revolving fund established by Section 311(k). Here, Ward cleaned up the spill, apparently to the satisfaction of the Government as well as the District Court below, which reduced his fine by half because of those efforts;

8. The owner of a facility which sustained a spill is liable to the Government for the actual costs incurred by the Government in a clean-up operation except where the discharge was caused solely by an act of God, war, negligence on the part of the United States, or an act or omission of a third party, Section 311(f). Funds recovered pursuant to this provision are deposited in the revolving fund established under 311(k);

9. The owner or operator in all cases remains liable to third parties for property damage.

Thus, the statutory scheme provides for strict liability for operators of facilities where an oil spill occurred. The owner was required to report the spill or face criminal prosecution for his failure to report. Once he reported the spill, however, the information he provided would be used to assess an automatic penalty that was to be as high as $5,000.00[3] unless there were mitigating factors.[4] The payment of the fine, however, does not relieve the operator's (a) liability for clean-up costs, (b) liability to property owners for damage inflicted as a result of the spill, (c) possible criminal prosecution for the spill.

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3. A. 40.

4. The information provided is not "neutral" but definitely incriminating. Thus, the rule of *California v. Byers*, 402 U.S. 424 (1971) and *United States v. Sullivan*, 274 U.S. 259 (1927) is not applicable.

It is this statutory scheme that Ward believes, and the Court of Appeals found, makes the imposition of a "civil penalty" under 311(b)(6) a criminal case for purposes of the Fifth Amendment self-incrimination clause.

SUMMARY OF ARGUMENT

On March 23, 1975, a shut-in natural gas well-site operated by Respondent Ward sustained an oil discharge which, for purposes of this action, must be deemed to have reached navigable waters of the United States. Ward reported the spill in accordance with the statutory directive [33 U.S.C. §1321(b)(5)] to avoid the criminal penalty there imposed for failure to report an oil spill. Based solely upon Ward's report, the Coast Guard, pursuant to law, assessed a penalty against him of $500.00 for the spill itself, pursuant to 33 U.S.C. §1321(b)(6) [hereinafter referred to as §311(b)(6)]. A collection action was commenced in the United States District Court after Ward refused to pay, claiming that §311(b)(6) was violative of the Fifth Amendment to the United States Constitution. The District Court held against Ward. The Court of Appeals reversed. The Solicitor General petitioned for certiorari, which this Court granted.

The question presented is whether a proceeding under the Federal Water Pollution Control Act for the assessment of a "civil penalty" against the individual owner or operator of a facility, from which oil was discharged in violation of §311(b)(6), is a "criminal case" within the meaning of the Self-Incrimination Clause of the Fifth Amendment to the Constitution, in which the Government is barred from using any information about the discharge that the individual is required by the Act to report under pain of criminal sanctions. At the time of the spill here

the maximum "civil penalty" was $5,000.00. Under present law the maximum "civil penalty" is $250,000.00.

Respondent's position is that the imposition of a "civil penalty" in these proceedings is violative of the Fifth Amendment Self-Incrimination Clause to the United States Constitution, in that it requires an owner or operator to report a spill, and following such report, a mandatory "civil penalty" is imposed.

Since the English common law, penalties, fines, and forfeitures have historically been treated as penal or punitive for purposes of avoiding self-incrimination. The English common law was that no man could be compelled to incriminate himself in any action to recover penalties or fines. During the development of the American colonial period, we incorporated the body of English common law into our legal system. The American colonies continued in the pre-constitutional period the English common law that the protection against self-incrimination was to be interpreted broadly and included actions to collect fines, penalties, and forfeitures as well as traditional criminal prosecutions. Following the formal adoption of the Self-Incrimination Clause and the Fifth Amendment, the American State and Federal Courts continued this interpretation.

This English, colonial and post-Fifth Amendment ratification doctrine that penalties, fines, and forfeitures were criminal cases for purposes of the protection against self-incrimination was expressly affirmed by this Court in 1886 in *Boyd v. United States.* It has been reaffirmed implicitly or explicitly on five occasions since *Boyd; Lees v. United States, Hepner v. United States, United States v. Regan, Helvering v. Mitchell,* and *United States v. United States Coin & Currency.*

Ward urges that the Fifth Amendment privilege against self-incrimination should apply in this case, because the spill penalty in question is at least "quasi-criminal" within the meaning of that term as set forth by *Boyd* and *United States v. United States Coin & Currency,* and thus invokes fundamental individual rights guaranteed by the Constitution.

Ward recognizes that in actions to collect fines, forfeitures, and penalties, the proceedings are not a criminal case for all purposes under the first Ten Amendments to the United States Constitution. Historically, this Court and other courts have held that actions to collect fines, forfeitures, and penalties, though civil in form, are in reality "criminal proceedings" for the purposes of the Self-Incrimination Clause of the Fifth Amendment.

The government claims that the self-incrimination clause applies only if the sanction is punitive, and that the test to determine whether the sanction is remedial (thus civil) or punitive (thus criminal) is governed by the factors enunciated in this Court's decision in *Kennedy v. Mendoza-Martinez.* Ward states that these factors are not controlling in this case, because (1) the factors were listed in *Kennedy v. Mendoza-Martinez* only as dictum and thus not binding, (2) the factors were not relied upon in the case where they were developed, and (3) employing the factors will lead to ambiguous and inconsistent results, as the history of judicial interpretation of this statute reveals.

However, Respondent believes, as the Court of Appeals did below, that even if the seven factors in *Kennedy v. Mendoza-Martinez* were applied in the instant case, the factors would point towards §311(b)(6) as being punitive or criminal in nature.

This result is reached, in part, because the penalty is imposed against an owner or operator without regard to fault or without regard to his clean-up efforts. The precise same conduct is made a violation of the criminal statutes, and the Coast Guard Commandant's Instructions on the factors which are to be considered in assessing the penalty clearly indicate a punitive, non-remedial function. For example, the Coast Guard is instructed to consider such factors as the gravity of the offense, the prior history of the alleged offender, and other punitive-type considerations. Those considerations that would indicate a remedial function such as cost of clean-up or clean-up operations by the owner or operator are expressly not included as factors in determining the penalty.

Although monies collected from the assessment of "civil penalties" go into a revolving fund to help pay clean-up costs, the owner-operator of the unit causing the spill still remains liable for those clean-up costs and liable for damage done to property.

Thus, an examination of the statutory scheme of enforcement and the Commandant's Instructions concerning enforcement clearly indicates a punitive, non-remedial function of §311(b)(6). This result is further supported by the common law tradition and the constitutional doctrine enunciated by this Court that actions to collect fines, penalties, and forfeitures have traditionally been considered a "criminal case" for purposes of the privilege against self-incrimination.

Thus, the decision of the Court of Appeals should be upheld, and no evidence furnished by the owner or operator pursuant to the statutory requirement of notifying the Coast Guard of a spill should be introduced into evidence against him in assessing a penalty under this Act.

ARGUMENT

PROPOSITION I:

PENALTIES, FINES, AND FORFEITURES HAVE HISTORICALLY BEEN TREATED AS PENAL OR PUNITIVE FOR PURPOSES OF AVOIDING SELF-INCRIMINATION:

1. The English Common Law Was That No Man Could Be Compelled to Incriminate Himself in Any Action to Recover Penalties or Fines;

2. The American Colonial, Pre-Constitutional Experience Incorporated in Practice This English Common Law Tradition and Interpreted the Protection Against Self-Incrimination Broadly, Including Actions to Collect Fines, Penalties, and, Forfeitures;

3. Following the Adoption of the Fifth Amendment the American State and Federal Courts Continued This Interpretation;

4. The English, Colonial and Post Fifth Amendment Ratification Doctrine That Penalties, Fines, and Forfeitures Were Criminal Cases for Purposes of the Protection Against Self-Incrimination Was Expressly Affirmed by This Court in *Boyd v. United States,* **116 U.S. 616 (1886).[5] It has been reaffirmed, implicitly or explicitly, on five (5) occasions since** *Boyd*: *Lees v. United States, Hepner v. United States, United States v. Regan, Helvering v. Mitchell,* **and** *United States v. United States Coin and Currency.*

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5. Mr. Justice Brandeis called *Boyd*, "A case that will be remembered as long as civil liberty lives in the United States." *Olmstead v. United States,* 277 U.S. 430, 477 (dissenting opinion).

A. Background to English Rule.

The protection against compulsory self-incrimination is of English origin, despite some attempts by scholars to attribute it to Continental theory.[6] Yet, it was the methods of the Inquisition in Europe under Innocent III that, when adopted in Britain, gave rise to the maxim, "*nemo tenetur prodere seipso*" (no man is bound to accuse himself). The Inquisition had been instrumental in Europe in diminishing the role of the accusatorial system of legal procedure. Under the latter system the burden of proof had been on the accuser, the Church or the Crown, to prove their case by independent evidence. The Inquisition method, by contrast, placed primary emphasis on proving the case by cross-examination (inquisition) of the accused. The Judge in essence became both prosecutor and fact-finder, seeking to establish his case primarily by the accused's own admissions. Yet, for various reasons, in England the Inquisition had less force. One, the English common law tradition to a large extent rejected punishment of crimes of the mind, such as heresy, which had been the prime object of the Continental Inquisition.[7] Moreover, there was less widespread religious dissent in England during the 12th and 13th Centuries than on the Continent, making inquisitorial procedures less popular. Most importantly, shortly before the beginning of the Inquisition in Europe, Henry II began initiating procedural reforms in the royal and common law courts of England. Such reforms as increasing the role of the jury as fact-finders as opposed to purely wit-

6. Leonard W. Levy, *Judgments, Essays on American Constitutional History*, (The Right Against Self-Incrimination), p. 269 (Quadrangle Books, Chicago, 1972).

7. While heresy and other religious crimes were prosecuted in England, such was not generally part of the common law tradition. Rather, such actions were generally dealt with in ecclesiastical or other prerogative courts.

nesses, the right of a jury determination of probable cause before being subjected to stand trial (the Assize), and increasing the public nature of trials, all gave impetus to making the English system of justice accusatorial rather than inquisitional. It was within this context that the concept developed in England that in order to prove the case against an accused, it must be done by evidence independent of the accused's own testimony. In fact, in England during this time and even in colonial America in subsequent years, an accused was not even competent to testify in his case for or against himself since he was an interested party and hence disqualified.[8]

Yet, in the royal and other prerogative courts of England, such as the Court of Star Chamber, the inquisitorial practices more common to the Continent continued to be used. Such courts were not bound by the common law tradition, yet possessed jurisdiction over any crime which they defined as such. It was, though, because of the growing common law accusatorial tradition that Englishmen had come to recognize their right not to accuse themselves. Under Henry II, the system of common law procedure rapidly expanded and centralized over the English nation. When confronted with the inequities of the inquisitional system in the prerogative courts, Englishmen began to assert their common law right against self-incrimination there as well. It was, then, in this clash between these diametrically opposed systems that the common law right against self-incrimination was established and began to grow to its present dimensions.

As originally understood in England, the right against self-incrimination was extremely broad. Indeed, the right

8. Levy, *ibid.*, p. 243; and Wigmore, *Treatise on Evidence*, I § 575; and William Searle Holdsworth, *A History of English Law* (London, 1903-38), IV, 193-196.

was successfully asserted not only in criminal cases, but also in cases where the Defendant or witnesses' answers would subject them to disgrace or self-infamy.[9] Yet, even in the context of criminal proceedings only, the right against self-incrimination was interpreted broadly. Specifically, from the date of its origin, it had been a cornerstone of the right that it applied in cases involving penalties and forfeitures, whether or not they were designated by the controlling lawmaker as civil or criminal.

B. The English Right Against Self-Incrimination Extends to Actions for Penalties and Forfeitures.

One of the first statements of this rule is found in *The Trial of Sir Jonathan Freind, State Trials,* Volume XIII, 1, at 17 (1696). Sir Jonathan was being tried for high treason. The prosecution attempted to swear in a witness, during which Freind interjected the question of whether such witness was a Roman Catholic or a Protestant. The Court, although indicating that the witness could answer if he so desired, admonished him that by doing so he might subject himself to a *penalty* because of the illegality of changing from the Protestant to Catholic faith. The Lord Justices

9. William Tyndale, *The Obedience of a Christian Man* (1528), reprinted in Henry Walker, Editor, *Doctrinal Treatises and Introductions to Different Portions of the Holy Scriptures,* by William Tyndale (Cambridge, 1848), p. 355; Doctrine of Thomas Cartwright and Others, in Albert Peel and Leland H. Carlson, Editors, *Cartwrightiana* (London, 1951), pp. 30-46 ff., 38 and documents about the same date in Thomas Fuller, *The Church History of Britain,* J.S. Brewer, Editor (Oxford, 1845), V, 107-108; *Trial of Nathaniel Reading, State Trials,* VII, 259-296-7 (1679); *Trial of Peter Cook, State Trials,* XIII, 311, 334-5 (1696); *Trial of Jonathan Freind, State Trials,* XIII, 1, 17 (1696); *East India Company v. Campbell,* 1 Vesey Sr. 246 (1749), *Blackstone's Commentaries,* III, 363, 370. For American cases showing that the common law right protected against self-infamy, see *State v. Bailly,* 2 N.J. 296 (1807); *Vaughn v. Perrine,* 3 N.J. 299 at 303 (1811); *Miller v. Crayon,* 2 Brevard (S.C.) 108 (1806); and *People v. Herrick,* 13 Johnson (N.Y.) 82 (1816).

then unanimously held that a witness was not bound to answer a question which could subject him to a *penalty or prosecution*:

> Lord Chief Justice: "No man is bound to answer any question that tends to make him *accuse himself* or subject him to any penalties." (Emphasis ours) At 17
>
> Lord Chief Justice Treby: ". . . I am of the same opinion, that no man is bound to answer any questions that will subject him to a *penalty,* . . . ." (Emphasis ours) At 17
>
> Justice Nevil: "I am of the same opinion, it does subject him to a *penalty*; . . . ." (Emphasis ours) At 17
>
> Justice Rakeby: "I think, it is not a question that can a right be imposed upon him; he may answer it if he will; but he is under no obligation to answer it, because it may tend to accuse himself of a crime for which he may be prosecuted, *and likewise will subject him to other penalties which the law cannot compel him to subject himself to.*" (Emphasis ours) At 17-18

In the case of *Smith v. Read,* 1 Atkyn 526, 529 (1736), a bill was brought for a forfeiture and a penalty for the rents and profits of an estate. The Plaintiff's bill sought to compel the Defendants to disclose facts which, if true, would have resulted in the Defendants' liability in regards to the forfeiture and penalty in question. In overruling the Plaintiff's discovery motion, the court said:

> "The law obliges no man to accuse himself, and for this . . . they cited 2 Cha. Ca. 8. Molings and Molings, . . . where a disability was held equivalent to a *penalty,* or *forfeiture* . . . ." At 526

Lord Chancellor "I think the defendant is not bound to discover, for there is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or *anything in the nature of a penalty.*" (Emphasis added) At 527

Similarly, in the well-known case of *Harrison v. Southcoate,* 1 Atkyn 528, 529 (1751), 2 Vesey Sr. 398, 394-95 (1751), the court in ruling upon a similar discovery request said:

"The rule of law is, that a man shall not be obliged to discover what may subject him to a *penalty,* not what must only (1), and though upon the particular circumstances of the case, it might not possibly create a forfeiture, as it does not appear at present with certainty, whether such a discovery would create a forfeiture, yet eventually it may do so; and therefore with regard to so much of the plea as relies upon the statute of the 11 and 12 Will. 3 it ought to be allowed . . . ." (Emphasis ours) At 1 Atkyn 529

In *Duncalf v. Blake,* 1 Atkyn 52, 53 (1735), the defendant sought to recover on an insurance policy drawn by the Plaintiff to cover the Defendant's goods. When the Plaintiff sought to compel the Defendant to disclose the nature of his cargo on board, the Defendant refused to do so on the basis that if he did, his cargo might be subject to forfeiture under English laws prohibiting the exportation of wool from Ireland to any port other than Liverpool. That law provided:

"That none shall directly or indirectly export from Ireland into any foreign dominion any wool, and all offenders against this made liable to the *forfeiture* of the said wool, and also to the forfeiture of 100 pounds for every offense." (Emphasis ours) At 53

On the basis of liability to such a forfeiture, the Lord Chancellor sustained the Defendant's plea not to answer in regards to any such goods that might be subject to the penalty or forfeiture under the act.

In *Earl of Suffolk v. Green,* 1 Atkyn 450 (1739), the Plaintiff brought a bill to perpetuate the testimony of the Defendant, a party to a bond entered into by the Plaintiff's ancestors. The Plaintiff had charged that the Defendant witness had been guilty of usury on the bond. If true, it would have subjected the Defendant to monetary *fines* on the basis of such usury. In upholding the Defendant's demurrer to the Plaintiff's discovery on such a basis, the Court said:

"As to the first part, that it would subject the Defendants to a *penalty,* the demurrer is proper. . . ." (Emphasis ours) At 450

Similarly, in *Boteler v. Allington,* 3 Atkyn 453, 457 (1746), the Defendant demurred in a similar case on the basis that the discovery sought would subject him to a forfeiture and a penalty. In response, the Court ruled:

". . . I am of the opinion the defendant had a right to demur, not because of any consequence to the plaintiff, for the fact of which he seeks discovery may very easily be ascertainable by the bishop's register, but for the sake of the rule of the Court, that a defendant is not obliged by a discovery to subject himself to a *forfeiture, or anything in the nature of a forfeiture.*" At 456

"And therefore in all bills to stay waste, a plaintiff is not entitled to a discovery, unless he waives the double *penalty* which is treble damages by the statute of Gloucester. . . ." (Emphasis ours) At 457

The case of *East India Company v. Campbell* (Exchequer), 1 Vesey Sr. 246-47 (1749), is also instructive. In that case the Attorney general sought to discover how the Defendant came to possess certain goods, to which the Defendant would not answer on the basis that to do so would subject him to a *fine* or corporal punishment; or that if he did so, he would be liable for *penalties* based upon Parliamentary acts regulating trade. To such a plea the Court agreed. Moreover, in *Bird v. Hardwicke,* 1 Vernon 109 (1682), the bill charged that the Defendant, in order to raise the price of his wines and to retard the sale of Plaintiff's, caused the Plaintiff's wines to be seized on the basis that they were illegal as French imported wines. When the Plaintiff sued the Defendant to recover his damages, the Defendant refused to answer any discovery on the basis that to do so would subject himself to "forfeiture" under English laws prohibiting his conduct. The Court again sustained such a position, once again on the basis that a man is not bound to disclose that which would subject himself to a penalty or a forfeiture.

Thus, from the beginning, the right against self-incrimination has been applied in cases involving penalties and forfeitures. To be sure, the English example demonstrates that it was the threats of fines, penalties, and forfeitures that provided the bulk of litigation in regards to the right and was a major impetus in its development.

C. American Colonial Expression Prior to Ratification of Self-Incrimination Claims.

1. English common law adopted in colonies.

It was in this tradition that the American common law evolved. From the outset of colonial America, the right against self-incrimination was both invoked and upheld in cases involving penalties, fines, and forfeitures.

Indeed, it is clear that the colonists in America intended to incorporate the English common law into their system of law. All of the royal charters in the American colonies required that the laws of those colonies conform with English law. This necessity originated with the Virginia Charter of 1609 and was continued in the Pennsylvania Charter of 1681, the Georgia Charter of 1732, the Massachusetts Bay Charter of 1628-29, and the New York Charter of 1664.[10] This practice seems to have originated with the patent from Queen Elizabeth to Sir Humphrey Gilbert in 1578[11] and took the following form. That patent provided that Gilbert should have the power to govern the inhabitants of lands he settled and to exercise his control:

> "According to such state lawes and ordynaunces as shalbe by him (etc.) devysed or established for the better government of the said peoples as aforesaid to alwaies that the said statutes lawes and ordynances maye be as neare as conveniently may agreeable to the forme of the lawes and pollicies of England."[12]

The Charter to Sir William Raleigh, Gilbert's successor, exemplified almost the identical language,[13] as did the Massachusetts Bay Charter.[14]

The colonists were making a positive effort to both preserve their English heritage while at the same time commencing their history as independent Americans. Thomas Jefferson, in a letter to Skelton Jones of July 28, 1809, said

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10. J. Goebel, "King's Law and Local Custom in Seventeenth Century New England," in Flaherty, Ed., *Essays in the History of Early American Law* (Univ. of North Carolina Press, Chapel Hill, 1969), p. 83.

11. Chaffee, "Colonial Courts and the Common Law" in Flaherty, Ed., *supra,* at 56.

12. *Ibid.,* at 57.

13. *Documents of American History,* Ed. by Henry Steele Commager (Appleton-Century-Crofts, N.Y., 1949), p. 7.

14. *Ibid.,* p. 18.

of the Virginia Constitutional Convention's work, that "we concluded not to meddle with the common law (by codification), i.e., the law preceding the existence of the statutes, further than to accommodate it to our new principles and circumstances. . . ." Indeed, Jefferson seemed convinced of the need of colonial law to incorporate the common law and privileges of England. In his letter to Judge John Tyler of June 17, 1812, this attitude seemed clear:

> "I deride with you the ordinary doctrine, that we brought with us from England, the common law rights . . . . On our arrival here, the question would at once arise, by what law we govern ourselves? The resolution seems to have been, by that system which we are familiar, to be altered by ourselves occasionally, and adapted to our new situation. The proofs of this resolution are to be found in the forum of the oaths of the Judges, 1 Hening's Stat. 169, 187; of the Governor, *ibid.*, 504; in the act for a provisional government, ibid., p. 372; in the preamble of the laws of 1661-2; the uniform current of opinions and decisions, and in the several records of all of our statutes framed on that basis . . ."[15]

So it seems clear that the colonists attempted to incorporate the English common law as a basis for their own. Yet, they reserved for themselves the room to adapt and alter the common law of England insofar as it would help suit their changed conditions in the new world. But as the cases both preceding and subsequent to the American Revolution will demonstrate, the right against self-incrimination, as it applied in a proceeding involving the threat of

15. The *Writings of Thomas Jefferson*, Ed. Andrew A. Lipscomb (Thomas Jefferson Memorial Association of the United States, Washington, D.C. 1904), Vol. XIII, p. 7. Quote from letter to Skelton Jones, *Ibid*, Vol. XII, p. 299.

a penalty, fine, or forfeiture, was an English common law right which the colonists would not wish to diminish, but rather would seek to strengthen and preserve, against not only encroachments by the English Crown, but when necessary against their own lawfully constituted government.

History amply demonstrates that the right against self-incrimination was a part of the common law of England that the colonies accepted. Moreover, it seems clear that this right was adopted and evolved in the context of proceedings involving monetary fines and forfeitures. Indeed, much of the basis of the American Revolution itself was centered on the imposition of fines and forfeitures by the English Crown on commercial enterprises of the American colonists. Similarly, that the founding fathers gave great impetus to the protection of property rights when framing the Constitution is beyond historical dispute.[16]

2. American colonies extended protection against self-incrimination to actions for fines, penalties, and forfeitures.

One of the first instances recorded involving the right against self-incrimination in America occurred in New York and involved the very tensions inherent between the Crown and its subjects that were litigated in the English common law, and exists today in the case at bar. Specifically, the invocation of the right was in opposition to a statute imposing a fine on one found illicitly trading. Since enforcement of previous acts such as the one in question in that case had proven unsuccessful, the legislature had adopted an amendment in 1722 that required all

16. See the *Federalist Papers* No. 10 (Madison); No. 15 (Hamilton); No. 25 (Hamilton); No. 54 (Madison); No. 70 (Hamilton); No. 84 (Hamilton); No. 85 (Hamilton).

those suspected of violating the act to give an oath that they had not done so.[17] If the subject refused, he was automatically convicted of illicitly trading and *fined* 100 pounds.

The colonists' opposition to the statute became focused on the self-incrimination provision and found expression in their objections directed to the Board of Trade. John Sharp, the London agent for several colonists, argued that the statute was illegal because the suspect "was by a very extraordinary oath, made liable either to accuse himself or to suffer great *penalties.*" (Emphasis added).[18] When other colonists gave evidence in front of the Board of Trade in regards to the proposed amendment, they similarly expressed their belief that it illegally required them to incriminate themselves. In discussing the act with a fur trader, John Peloquin, the Board of Trade asked him if he had ever purchased skins from the French, to which he replied:

> ". . . answering that question might give ill consequences to himself, if it were since the passing of the said acts; and since he believ'd their Lordships could not expect Mr. Peloquin should accuse himself."[19]

The Lordships changed the subject immediately, and subsequently recommended that Governor Burnett be urged to halt the illegal trade in another manner. The Board of Trade then pointed out the fatal flaw in the proposed amendment;

17. Leonard Levy, *Origins of the Fifth Amendment,* (Oxford Univ. Press, N.Y. 1968), p. 381.
18. *Ibid.*
19. *Ibid.*

> "There is an oath impos'd upon all traders whereby they are obliged to accuse themselves or else be under the greatest temptation to perjury."[20]

When New York finally enacted their new statute regulating the fur trade, the objectional provision was noticeably omitted.

In Massachusetts in 1754, the right again drew significant attention and recognition. That year the legislature enacted a new liquor excise tax, requiring purchasers to report to tax collectors, on oath if necessary, the amount of money they expended on liquor that year. Opposition to such a bill was formidable and widespread due to its incriminating oath. John Lovell, a Boston schoolmaster who had once taught John Hancock and Samuel Adams, described the bill as "the most pernicious Attack upon English Liberty that was ever attempted" and would if allowed enslave the country.[21]

Samuel Cooper, minister of the Brattle Church was even more precise in his attack on the oath. If one had to account as to his innocent conduct in this manner, which he felt was extortion, "every other Part may with equal Reason be required, and a Political Inquisition severe as that in Catholic Countries may inspect and countroul every Step of his private Conduct."[22] He continued:

> "But will anyone presume to say, that this will be no Diminution of our Liberties, if it be in a central part of our Constitution, that no Man is held to convict himself in any Affair where he is accus'd. And whoever will undertake to prove, that a Man can consistent with the Constitution, be obligid to clear

20. *Ibid.*
21. *Ibid.*, p. 386.
22. *Ibid.*

himself of an innocent Action by Oath, or *forfeit an heavily Penalty,* may a fortiori prove, that this practice is defendable in Criminal Cases."[23]

Such opposition bore fruit, as Governor William Shirley refused to sign the bill on the basis that it was an unprecedented violation of "natural rights".[24]

The privilege against self-incrimination repeatedly arose in connection with writs of assistance and their use in proceedings for penalties and forfeitures against colonial shippers. The writ allowed customs officials to search ships for goods allegedly shipped into colonial ports in violation of revenue acts or other acts regulating colonial trade. On the basis of evidence found, the Government could then instigate suits for *penalties and forfeitures* in the courts of Vice Admiralty. Such courts were governed by civil law rather than the common law tradition. Trials were held in secret, without the need of grand jury indictment and without the aid of common law principles. One of the common law protections most conspicuously lacking and which the Americans particularly deplored was the absence of the privilege against self-incrimination.

Henry Laurens, a South Carolina planter-merchant, was an unwilling participant in this system. In particular, he levelled his criticisms against the admiralty judge's abridgment of the right against self-incrimination. The injustice of Laurens' situation became well-known and furthered colonial opposition to procedures which subjected colonists to fines and forfeitures without the right against self-incrimination. Laurens himself quoted Lord Bacon against the practice, "whereby Men are inforced to accuse themselves . . . (when punishment or) 'grievous Inconveniences' " might be the consequence of confessing the truth. Specifically, the "grievous" consequence in question was an imposition of a fine and a penalty.[25]

23. *Ibid.*
24. *Ibid.*

When John Hancock fell victim to the same procedural injustice in Boston in 1768, popular opinion reached a groundswell in opposition to such practices. Boston's *A Journal of the Times,* in condemning the fine and forfeiture of citizens' property without the protection of the right against self-incrimination, condemned such practices as "Star Chamber Proceedings" using the "Inquistorial" tactics of examining citizens secretly and by "odious" interrogatories, in the hope that evidence could be "fished up" to sustain the prosecution. The *Journal* noted, in making reference to both the Laurens and Hancock cases, whether the Court might not next "put parties or witnesses to the torture and extend them on the rack."[26] Yet despite such public outcry against such self-incriminatory practices, the Philadelphia Customs Office in 1770 sought to question by oath every officer and seaman suspected of smuggling tea into the port. But Attorney General Andrew Allen, correctly sensing the colonial dedication to the principle of no self-incrimination, informed the collector of the port:

> "I am very clear in opinion that the Court of Admiralty cannot with propriety oblige any persons to answer interrogatories which may have a tendency to criminate themselves or subject them to a *penalty,* it being contrary to any principle of Reason and the Laws of England." (Emphasis ours)[27]

Indeed, at least seven of the early State Constitutions and Declarations of Rights contained provisions against

25. *Ibid.*, p. 398.
26. *Ibid.*, p. 399.
27. *Ibid.*, p. 399.

self-incrimination. Moreover, the wording of many of them was extremely broad, not being limited to criminal prosecutions at all. For example, the Delaware Declaration of Rights of 1776 provided:

> "Section 15: 'That no man in the Courts of Common Law ought to be compelled to give evidence against himself'."[28]

Such provision was distinguished from other more traditional criminal guarantees such as the right to counsel, a speedy trial, confrontation, and so on, which were located in separate provisions of the Declaration of Rights (Section 14). By framing the self-incrimination clause broadly, the drafters of such constitutions intended to make clear that the privilege applied in cases such as penalties and forfeitures, regardless of their designation as criminal or civil. Maryland's Declaration of Rights took a similar approach:

> XX. "That no man ought to be compelled to give evidence against himself, in a common court of law, or in any other court . . . ."[29]

As with Delaware, this provision was separated from those other traditionally criminal guarantees included in the Constitution, the latter being enumerated in Section XIX.

When James Madison first introduced the self-incrimination clause to Congress, he proposed the broad principle that, "no person . . . shall be compelled to be a witness against himself."[30] His wording, as with the State Constitutions previously noted, was intended to secure and in-

28. *The Bill of Rights, A Documentary History,* Bernard Schwartz, (Chelsea House, N.Y., 1971), Vol. I, p. 278.

29. *Ibid.*, p. 282.

30. Levy, *Origin of Fifth,* p. 423.

corporate into the Constitution the full scope of the common law right against self-incrimination.[31] Although many of the self-incrimination cases involving fines and forfeitures were designated as criminal already, Madison's draft went even a step further in securing this right, regardless of how the fine or forfeiture was classified, or regardless of the nature of the proceeding in which it arose.

Madison's wording was objected to by John Laurance, a Federalist lawyer from New York. Laurance felt that the provisions should be designated as referring to "criminal cases" only. His reasoning was that to do otherwise would make the amendment "in some degree contrary to laws passed."[32] What historians believe Laurance was referring to was Section 15 of the Judiciary Act of 1789. That Section, in the original draft, empowered the federal courts to compel civil parties to produce books and papers containing real evidence. It also allowed a party in a civil case to be examined under oath. In other words, Section 15 merely was one of the first discovery provisions in federal legal history. Apparently Laurance felt that the way Madison had framed the self-incrimination clause would jeopardize these discovery provisions of the Judiciary Act. Remarkably, Laurance's suggested change was accepted by Madison and the Committee of the Whole, and in the entire House with little debate. In light of the tremendous opposition to the use of self-incriminatory methods in cases involving forfeitures and penalties, as we have seen, and the role of this grievance in the American Revolution in general, one can only conclude that the framers felt that even by leaving the wording "criminal" in the self-incrimination clause, that the protection

31. *Ibid.*, p. 423.

32. *Ibid.*, p. 424.

would still extend to fines and forfeitures, regardless of their characterization by the legislature.

3. Post ratification proceedings treat actions to collect fines, forfeitures and penalties as "criminal cases" for purposes of the privilege against self-incrimination.

The entire case precedent subsequent to the ratification of the American Constitution also supports such a rationale. In *Taney v. Kemp,* 4 Harris and Johnson 348 (Md. 1818), the Court decided whether a witness was bound to answer the question touching on an issue which would subject him to criminal prosecution *or a penalty.* Though ruling that civil liability in itself was not necessarily a ground for not answering, the Court was unequivocal that being subject to a criminal prosecution *or a penalty* was

> "It is well established, that a witness shall not be obliged to answer questions which may subject him to *criminal prosecution; or to a penalty, or to a forfeiture.*" (Emphasis ours) At 350

Similarly, in *Johnson v. Goss,* 10 Tenn. (2 Yerg) 110 (1825), the Supreme Court of Tennessee ruled that a witness could not be compelled to answer in such circumstances. Johnson sued Goss for seducing his daughter, and when the daughter was cross-examined as to her chastity, an objection was taken. The Supreme Court upheld that objection on the basis that:

> "The law is, that 'a witness shall not be compelled to answer any question which subjects him to *penalties* or punishment, *or to a criminal* charge.'" (Emphasis ours) At 110

In *People v. Rector,* 19 Wend. 569 (N.Y. 1838), the Supreme Court of New York also decided whether the

self-incrimination clause protected a witness from answering a question that would subject him to a penalty. They answered that it would:

> "The authorities to this are well summed up in Roscoe's Cr. Ev. Phila. ed. of 1836, pp. 133, 4, 5; but need not be here examined. I will only observe that the practice of compelling the answer where there is *no penalty* seems to be gaining ground by the modern cases . . . . But he excused the witness because the offense was more than a mere moral one; it would subject her to a *penalty.*" (Emphasis added) At 581-582

In *Lister v. Boker,* 6 Blackf. 439 (Ind. 1843), the Indiana Supreme Court again specifically ruled on whether the self-incrimination protection applied to cases involving penalties and forfeitures. This case involved an assumpsit by Boker against Lister, based upon a promissory note. At the trial, Wood, the assignee of Lister, was called as a witness for the Defendant and asked what consideration he had given for the promissory note. The Court then interrupted and informed Wood that if the consideration given was small bills, issued by himself for the purpose of being used as circulating medium, he could be subjecting himself to penalties and forfeitures by answering. An Indiana Act of 1840 prohibited the circulation and issuing of small bills made by individuals or corporations for the purpose of passing as circulating medium. As punishment, the statute had provided for each offense a forfeiture of the bills and a penalty of double the amount of each bill so issued, to be recovered in an action on *debt.* Indeed, such an action was not a criminal prosecution per se. Yet the Court ruled that the witness was not bound to answer such an inquiry because:

"A witness is not bound to answer any question, if his answer will expose him to *criminal punishment, or a penal liability.* 1 Stark. Ev. 191- Dandridge v. Corden, 3 Carr and Payne 11 - (other cases cited)." (Emphasis added) At 440-41

Also instructive on this point is the Virginia Supreme Court case of *Poindexter v. Davis,* 6 Grat. 481 (Va. 1850). The Plaintiff Davis sued in detinue for the recovery of a slave sold by Steven Terry. Terry had purchased but a life estate in the slave from Davis, yet had sold it to Poindexter, the latter believing he purchased an absolute interest in the slave. At trial, the Plaintiff had prepared interrogatories calling on the Defendant to say whether or not he had purchased the slave from Terry. The Defendant answered them, and the Plaintiffs offered such evidence at trial, but the Defendant objected to their answers on the grounds that the Plaintiffs were seeking to enforce a *forfeiture.* The trial court overruled their objection, but on appeal the Defendant prevailed. The Court, in ruling that the Defendant was not bound to answer, demonstrated the strength of the American prohibition against self-incrimination in cases involving penalties and forfeitures:

"In the last respect, indeed, it conforms to the spirit of the common law which, jealous of the liberty of the citizen, protects him from being made his own accuser, or forced to give evidence against himself." At 490

Or, as the Appellant's brief put it, quoting Story's Equ. Pl. §579:

". . . it is well settled that a defendant will not be required to answer a bill of discovery, where his answer will subject him to a *penalty or forfeiture.* . . ." At 486

In another case involving a fine, yet not specifically classified as criminal, the Supreme Court of Georgia ruled that the self-incrimination guarantee indeed came into play. In *Bryan v. State,* 40 Ga. 688 (Ga. 1870), two defendants were required to appear before the Superior Court and show cause why they should not be fined for neglect of their duties as County Commissioners. The Defendants contended that the proceeding was criminal and they were not bound to testify against themselves. They were overruled by the trial court and fined $50.00. But on appeal, the court reversed, saying:

"It has been from time immemorial a settled principle of the common law, that no one shall be compelled to answer any question as a witness, tending to criminate himself *or* subject him to a *fine* or *forfeiture, or* any criminal charge: 1 Greenleaf Ev., pp. 620-21. Our evidence act . . . The words used are: 'No person shall be compelled to answer any questions tending to *criminate* himself or herself.' "

"It is true that this is not exactly a criminal case, yet, it closely analogizes itself to such cases. . . ." (Emphasis added) At 689

The Virginia case of *Langhorne v. Commonwealth,* 76 Va. 1912 (Va. 1882), also clearly illustrates the point. That case involved an indictment against William Henry Terry Langhorne for the burning of a tobacco factory. In attempting to discredit a witness on the basis that he had procured the execution of a deed based upon a false pretense, the Court ruled that the witness was not bound to answer such an inquiry. The Court said, in quoting 2 Taylor Ev. §1453:

" 'Where the answers would have a tendency to expose the witness, or, as it seems, the husband or wife

of the witness, to any kind of criminal charge, whether in the common law or ecclesiastical courts, or to a *penalty or forfeiture* of any nature whatsoever, the witness is not compellable to answer. This rule, which is of great antiquity (he says), applies equally to parties and to witnesses, and is now uniformly recognized by all British tribunals, whether civil or criminal. No party can be compelled to discover that which, if answered, would tend to subject him to any punishment, penalty, forfeiture, or ecclesiastical censure, however material the answer may be to his adversary's case . . . . This doctrine prevails in the spiritual courts and is part and parcel of the law of Scotland.' And it is the law of America. Greenleaf says: 'The authorities are exceedingly clear that the witness is not bound to answer.' 1 Green L. Ev. § 451." (Emphasis theirs) At 1021

> "Numerous authorities might be cited which clearly establish that if the fact to which the witness is interrogated forms but a *single remote link* in the chain of testimony, which *may* implicate him in a crime or misdemeanor, *or expose him to a penalty or forfeiture,* he is not bound to answer . . . ." (Emphasis ours) At 1022

In the case of *Masseth v. Johnson,* (C.C.) 59 Fed. 613 (1894), the Court adhered to the common law rule herein discussed. That case involved a bill in equity for the accounting for an alleged infringement of a patent. The vendor of the device alleged to be infringing the patent, who was not a party to the suit, was compelled to testify to the purchase and use of the patented item by the defendant. The Court held that he could be so compelled without violating the Constitutional provision that no witness should be compelled to testify against himself in a

criminal case. The basis of such ruling was that the statute in question did *not* subject the infringer to *penalties* or *forfeitures* but only authorized the Court to impose civil damages for such actions. They said:

> "It is contended that Palm cannot be compelled to give evidence on behalf of complainant, because thereby he may subject himself to *penalties and forfeitures* hereafter in accounting with the present complainant . . . . (W)e do not regard Rev. Sp. §§4919, 4921, as subjecting him hereafter to *penalties* and *forfeitures* . . . . (t)hey simply empower the court, in its discretion, and 'according to the circumstances of the case', to impose additional damages against the infringer . . . . The calling of Palm to testify was a violation neither in letter nor spirit of the constitutional provision (see Amendment 5) that 'no person . . . shall be compelled in any criminal case to be a witness against himself.' " At 614-15

Perhaps Henry Campbell Black's treatise on *Constitutional Law* (St. Paul, Minnesota: West Publishing Co., p. 574) in 1897 put it best when he said:

> "The guarantee (the self-incrimination clause) does not create any new right, but merely reaffirms a common law privilege. It is directed against the extraction of confessions . . . and against the inquisitorial method of trial. The seizure or compulsory production of a man's private books or papers, to be used in evidence against him, is equivalent to compelling him to be a witness against himself, and in a prosecution for a crime, *penalty,* or *forfeiture,* is *equally* within the constitutional prohibition." At 574

4. In *Boyd v. United States* and subsequent cases this court held that a civil action to collect fines, penalties, or forfeitures was a "criminal case" for purposes of the Fifth Amendment self-incrimination clause.

In *Boyd,* a forfeiture proceeding under the customs revenue laws, the United States claimed that Boyd and Sons, a partnership, had fraudulently evaded paying taxes on thirty-five cartons of imported plate glass. The statutory penalty for fraudulent non-payment of the tariff was forfeiture of the goods involved. Accordingly, the Government seized the glass and instituted forfeiture proceedings against it. During this proceeding, the Government obtained a court order directing that Boyd and Sons produce an invoice that allegedly contained proof that they had in fact violated the tax statute.

The statute pursuant to which the order was issued proved that failure to comply with the order would be treated as a confession of the allegations set forth in the Government's petition. The Boyds complied under protest, arguing that both the order and the statute authorizing it were unconstitutional and in derogation of the Fifth Amendment guarantees against self-incrimination. This Court unanimously agreed with this contention. Because of the penalty for non-compliance, the Court held that the statute violated the Fifth Amendment right against self-incrimination:

> "We are also clearly of the opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal . . . .
>
> "As therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law,

> are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself; . . ." At 634-635

In reaching this conclusion the Court examined in detail the English common law experience with self-incrimination and post Civil War congressional enactments providing for the protection of the privilege against self-incrimination in suits to collect penalties and forfeitures, though civil in form. The Court paid especially close attention to the actions of the First Congress in proposing the self-incrimination clause in what became the Fifth Amendment;

> "The views of the first Congress on the question of compelling a man to produce evidence against himself may be inferred from a remarkable section of the Judiciary Act of 1789. The fifteenth section of that Act . . . as originally enacted is as follows:
>
> > 'All the said courts of the United States shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in the possession or power, which contain evidence pertinent to the issues, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order (to produce books) it shall be lawful . . . to give judgment for the defendant . . . .'" At 630-631

The Court found from adoption of this section an intent by the Congress to give the widest possible application of the protection against self-incrimination, stating,

> "Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime or forfeit his property . . . ." At 631

The Court concluded that even though the statute in question in Boyd and the form of the action to collect the penalty was expressly not designated criminal by Congress, still, for purposes of the Fifth Amendment self-incrimination clause, they were in fact quasi-criminal and Boyd and Sons could not be compelled to incriminate themselves in an action to collect a forfeiture. At 634-35

Seven years later in *Lees v. United States,* 150 U.S. 474 (1893) this Court expressly reaffirmed without dissent the doctrine of *Boyd* insofar as it relates to the self-incrimination cluase in actions to collect fines or penalties. In *Lees,* the United States sought through a civil action to collect a forfeiture (in realty, a penalty) of $1,000.00 for a civil violation of an act prohibiting the importation of aliens under contract to perform certain labor in the United States (23 Stat. at 332). At the trial, Lees was called as a witness by the Government. He objected to testifying on the grounds of the privilege against self-incrimination. His objection was overruled. This Court held:

> "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case the defendant cannot be compelled to be a witness against himself. It is unnecessary to do more than refer to the case of Boyd v. United States (citation omitted) . . . ." At 430

In *Hepner v. United States,* 213 U.S. 103 (1909) a monetary penalty imposed for violation of the immigration laws was deemed a civil action in which the rules of civil procedure applied generally and the Government was held to be entitled to a directed verdict. Hepner had complained that the action was in reality a criminal prosecution, citing *Boyd* and *Lees,* and arguing that, as such, the Government was not entitled to receive a directed verdict in a criminal case. Mr. Justice Harlan, speaking for the Court, with only one dissent, addressed this issue:

> "This view cannot be sustained. That case was a civil action to recover a penalty for importing an alien into the United States. . . . In that case (Lees) the trial court compelled one of the defendants to testify for the United States and furnish evidence against himself. This Court held that that could not be done; saying that 'this, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself,' meaning thereby the use of depositions. . . . In the latter case (Boyd) it was adjudged that penalties and forfeitures incurred by the commission of offenses against the law are of such a quasi-criminal nature that they come within the reason of criminal proceedings . . . of that part of the Fifth Amendment declaring that no person shall be compelled in any criminal case to be a witness against himself.
>
> "So that the Lees and Boyd cases do not modify or disturb but recognize, the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against him-

self in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense." At 111-112

In *United States v. Regan,* 232 U.S. 37 (1914), *Boyd* was again reaffirmed without dissent. A $1,000.00 penalty had been imposed for violation of the immigration laws. Regan argued that the action against him, though civil in form, was in reality criminal and that the Government must prove its case beyond a reasonable doubt, the standard of proof in a criminal prosecution. This Court disagreed, but distinguished an evidentiary rule from the constitutional protection against self-incrimination.

Mr. Justice VanDevanter, dismissed the Regan contention that *Boyd* and *Lees* governed his case. The right was distinguishable, and *Boyd* and *Lees* were

". . . without present application, for they deal with guaranty in the Fifth Amendment to the Constitution against compulsory self incrimination, which as this court has held, embraces proceedings to enforce penalties and forfeitures as well as criminal prosecutions, and is of broader scope than are the guaranties in Article III and the Sixth Amendment governing trials in criminal prosecutions (omitting citations)." At 50

In *Helvering v. Mitchell,* 303 U.S. 391 (1938) the issue was whether an acquittal on a criminal indictment for tax evasion was a bar to a "civil" action by the government to collect a fifty (50) percent "civil fraud" penalty. The Court held that the Fifth Amendment double jeopardy clause did not prevent the assessment or collection of the penalty, for the penalty was regulatory, tax raising, not punitive. Mr. Justice Brandeis, speaking for the Court, distinguished, however, the self-incrimination clause of the same amendment. We believe this analysis and reasoning

makes explicit what the earlier intervening cases since *Boyd* made only implicit:

"The distinctions here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, cases have usually attempted to distinguish between the type of procedural rule involved than the kind of sanction being enforced (citations omitted)." At 400, fn.3

He then distinguished the cases permitting a directed verdict in actions to collect civil penalties and the holdings that the Government need not prove its case in such actions beyond a reasonable doubt with those situations where a claim of the protection against self-incrimination occurred in the same actions. He expressly cited *Boyd* and *Lees* and the language from *Regan,* ". . . the guaranty in the Fifth Amendment to the Constitution against compulsory incrimination . . . is of broader scope than are the guaranties in Article III, and the Sixth Amendment governing trials in criminal prosecutions." 232 U.S. 50 at 400, fn.3

In *United States v. United States Coin and Currency,* 401 U.S. 715 (1971) the *Boyd* doctrine was reaffirmed. This Court ruled that the privilege against self-incrimination could properly be invoked in forfeiture proceedings involving money which the Government had seized from a person's possession at the time of his arrest for violation of federal gambling registration and tax statutes. In language that is very applicable to the present statutory scheme, this Court, speaking through Mr. Justice Harlan, declared it had no doubts that Congress possessed the power to authorize collection of taxes on unlawful gambling activities.

"It was only the method Congress had adopted in collecting the tax that raised the Fifth Amendment question." At 717

Similarly, here there can be no question of the power of Congress to prevent oil spills and discharges, but it is the method Congress has chosen that raises the Fifth Amendment question.

In *One Lot*, as here, ". . . the Government urges that the present forfeiture should not be considered the result of a 'criminal' proceeding for the Fifth Amendment purposes." At 719. Invoking the doctrine of *Boyd* and its progeny, the Court held the forfeiture proceedings to be a "criminal case" within the meaning of the Fifth Amendment self-incrimination clause. In holding that the forfeiture proceeding was invalid, this Court was essentially stating only that the civil penalty could not be imposed in a manner inconsistent with the Fifth Amendment right against self-incrimination.

Ward asserts, based on the analysis of decisions since *Boyd*, that the penalty imposed upon him here is "quasi-criminal" and therefore invokes certain fundamental constitutional guarantees normally accorded criminal defendants, even though such a penalty does not invoke the full panoply of individual rights which a criminal penalty would trigger.

One such fundamental right invoked by a quasi-criminal penalty is the privilege against compelled self-incrimination.

The common law tradition which afforded a broad and liberal application of the self-incrimination privilege is equally a part of our constitutional heritage. The Fifth Amendment self-incrimination privilege has been afforded a liberal construction. See, e.g., *Miranda v. Arizona*, 384

U.S. 436 (1966); *Ullmann v. United States*, 350 U.S. 422 (1956); *Hoffman v. United States*, 341 U.S. 479 (1951); *Helvering v. Mitchell*, 303 U.S. 391, 400 n. 3 (1938); *Boyd v. United States*, 116 U.S. 616 (1886); *Lees v. United States*, 150 U.S. 476 (1893); *United States v. United States Coin and Currency*, 401 U.S. 715 (1971); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964).

The *Boyd* case is the root of a doctrine reaffirmed as recently as 1971 in *United States v. United States Coin and Currency, supra*, which acknowledges that even where purely civil penalties are involved, some of the constitutional protections afforded criminal defendants are applicable.

Certainly an oil spill, prohibited by 33 U.S.C. §1326 (b) (3), is an "offense against the law" by the very words used in 33 U.S.C. §1326 (b) (6):

". . . operator of any . . . facility . . . from which oil . . . is discharged *in violation of paragraph (3)* . . . shall be assessed a civil *penalty* . . . for each offense * * *" (Emphasis added)

Such language seems to clearly indicate a "penalty . . . incurred by the commission of (an offense) against the law" in the words of *Boyd*.

The Government in its Brief (p. 49) argues that *Boyd*, *Lees*, and *Coin and Currency* "do not stand for the proposition that monetary penalties that are plainly civil in character should nevertheless be regarded as criminal in order to further the 'policies' of the Fifth Amendment." It is difficult to reconcile that statement with the plain language of the cases themselves, or Mr. Justice Brandeis' opinion in *Helvering, supra*, at 400 fn.3. Indeed the Government's attempted distinction has been rejected both by the Tenth Circuit, *Bramble v. Richardson*, 498 F.2d 968

(1974), and legal scholars who have studied the problem at some length: See, Charney, Johathan I., "The Need for Constitutional Protections for Defendants in Civil Penalty Cases," 59 Corn. L. Rev. 478, 503, 515 (1974); Clark, J. Morris, "Civil and Criminal Penalties and Forfeitures: A Framework for Constitutional Analysis", 60 Min. L. Rev. 379, 392, et seq.; Comment, "Compelled Self-Disclosure and Civil Penalties: The Limits of Corporate Immunity in Oil Spill Cases, 55 Boston University Law Review 112, 131 (1975)"; Note, "The Concept of Punitive Legislation and the Sixth Amendment," 32 U. Chi. L. Rev. 290, 291 (1965).

Assuming, however, the Government is correct in its analysis of the issue, its application to the statutory scheme here fails. The Government claims that *Boyd* reached its result because "The Government filed an information for forfeiture of certain goods, but did not file a criminal charge . . . . (T)he Court premised its holding on the specific finding that the forfeiture of goods was one of the 'penalties affixed to the criminal acts' prohibited by the statute" (p. 50). Leaving aside for the moment that this statement utterly fails to take into consideration the four (4) paragraphs immediately preceding the statement quoted (*Boyd*, 632-4), the same test applied here would make 311(b)(6) a criminal penalty. Ward submits that from the relevant constitutional standpoint, there is no difference between an oil operator who pays a $250.00 civil fine and an oil operator who pays a $250.00 criminal fine, either of which could be imposed for the same course of conduct. A discharge of oil into the navigable waters of the United States was, and still is, punishable as a criminal offense pursuant to the Rivers and Harbors Appropriation Act of 1899 (1899 Refuse Act), 33 U.S.C. §411. See *United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974), where the Refuse Act criminal penalty was imposed for an

oil seepage, and in which the Court specifically held that the Government was not required to prove common law *mens rea;* to the same effect, see *United States v. Interlake Steel Corp.*, 297 F.Supp. 912 (D.C. Ill. 1969), a criminal prosecution under the 1899 Refuse Act for a discharge of iron particles and an oily substance; see also *United States v. U.S. Steel Corp.*, 328 F.Supp. 354 (D.C. Ind. 1970). It is clear from the foregoing cases that a discharge of oil into navigable waters may subject one to a criminal penalty under the 1899 Refuse Act, even without any showing of intent, or *scienter,* or common law *mens rea.*

In fact, prior to the enactment of the Water Quality Improvement Act of 1970, the only remedy against Ward for this particular oil spill would have been a criminal penalty under the 1899 Refuse Act. A comparison of the prohibitory clauses of the 1899 Refuse Act and the Federal Water Pollution Control Act Amendments of 1972 reveals little difference. The 1899 Refuse Act, as codified at 33 U.S.C.A. § 407, provides inter alia:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited . . . from the shore, wharf, manufacturing establishment, or mill of any kind, any refuse matter of any kind or description whatever [other than sewage] . . . into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water . . . ."

From the Federal Water Pollution Control Act Amendments of 1972, as codified at 33 U.S.C.A. §§1321(b)(3) and (6):

> "(3) The discharge of oil or hazardous substances into or upon the navigable waters of the United States

. . . in harmful quantities as determined by the President . . . is prohibited. . . ."

* * *

"(6) Any owner or operator of any vessel, on-shore facility or off-shore facility from which oil . . . is discharged in violation of paragraph (3) of this subsection shall be assessed a civil penalty. . . ."

* * *

Clearly, the only essential difference between these two provisions is the nature of the penalty prescribed. The course of conduct is identical, and the language of the prohibition, while not in *haec verba* is so essentially the same in meaning as to be indistinguishable; the only difference is that the Refuse Act specifically provides that if the oil spiller is charged under its provisions, and pays a fine, it will be a criminal fine, whereas if the oil spiller is charged under the provisions of the Federal Water Pollution Control Act Amendment of 1972, the Congress can compel an oil spiller to report himself and be fined "civilly" and thus effectively free the Government from the restraints imposed by honoring the Fifth Amendment guarantee against self-incrimination afforded to citizens.

Thus, when the Government claims (p. 52) that "in the cases upon which Respondent (Ward) relied in the Court of Appeals, the monetary penalty or forfeiture was dependent on the occurrence of an integrally related criminal offense, and was, in actuality, but a form of punishment for the commission of that offense," it has described precisely and exactly the situation here because the same act that gave rise to the "civil penalty" also could have been used to prosecute a criminal action, without further evidence of intent. Ward could have been prosecuted criminally or proceeded against civilly and the same is true

for Boyd and Sons, John Lees,[33] and Donald J. Angelini (*Coin and Currency*), who in fact was prosecuted by indictment. *Coin and Currency, supra,* at 716.

When the Government claims that Section 311(b)(3) "contains no criminal sanctions" (p. 53), it is neglecting to point out that 311(b)(3) is the companion sanction to the Refuse Act. Contrary to the Government's argument, this statutory scheme is clearly dissimilar from the holding in *Helvering* where, the Government claims (p. 53), the Court "there observed that where the monetary penalty or forfeiture is remedial, the defendant does not have the protection of a number of procedural rights normally associated with the criminal process, including the Fifth Amendment privilege against self-incrimination." However, *Helvering* did not discuss whether this would be true when there was a compelled self-incrimination under a threat of a criminal fine and imprisonment if the disclosure was not made, and a penalty up to $5,000.00 (now $50,000.00 and in some instances $250,000.00) if disclosure was made, without regard to fault, and there was an identical criminal provision. Obviously such a penalty would no longer be truly "remedial" or "regulatory" as *Helvering* intended.

The Government's Brief at pages 51-53 cites *United States v. Regan,* 232 U.S. 37 (1914); *Hepner v. United States,* 213 U.S. 103 (1909); *One Lot Emerald Cut Stones v. United States,* 409 U.S. 232 as standing for the proposition that there must be a "direct nexus to an underlying criminal offense." (Brief in Chief, page 53). The Government also relies upon dicta in *Helvering v. Mitchell, supra,* that neither the holding of *Boyd* nor that in *Lees* would

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33. This same refutation applies to the Government's efforts to distinguish *Lees* at p. 51 in its brief, for the same conduct there could have been a criminal or civil offense. Indeed, the statute referred to the act as an "offense" as does 311(b)(6).

necessitate the invocation of certain procedural rights associated with the criminal process where the sanction involved is remedial, rather than punitive.

The essential difficulty with the dicta in *Helvering v. Mitchell, supra,* is that it does not comport with the decisions of this court. *Boyd* was a limited decision, limited to protection and assertion of the Fifth Amendment self-incrimination privilege and the rights guaranteed by the Fourth Amendment. No other criminal procedural rights were invoked in *Boyd;* nor have they been subsequently in civil penalty proceedings. However, the Fifth Amendment self-incrimination privilege and the freedom from unreasonable searches and seizures have, since *Boyd,* consistently been held to be invoked in civil penalty proceedings in the decisions of this Court. *Marshall v. Barlow's Inc.,* 436 U.S. 307 (1975).

This Court has consistently upheld the self-incrimination privilege and the search and seizure provisions in civil penalty cases, and consistently denied the protections of other individual rights in such proceedings.

The Fifth Amendment self-incrimination provision was upheld in *Boyd v. United States, supra; Lees v. United States, supra; United States v. United States Coin and Currency, supra* and the Fourth Amendment protection against unreasonable search and seizure was upheld in *One 1958 Plymouth Sedan v. Pennsylvania,* 380 U.S. 693 (1965). On the other hand, the Court denied recognition for the assertion of double jeopardy in *One Lot Emerald Cut Stones v. United States, supra;* in *Helvering v. Mitchell, supra;* in *United States ex rel. Marcus v. Hess,* 317 U.S. 537 (1943); and in *Rex Trailer Co. v. United States,* 350 U.S. 148 (1956); in *United States v. Regan,* 232 U.S. 37 (1914), the Court held that the government was not required to prove its case beyond a reasonable doubt in a civil penalty

proceeding, and in *Hepner v. United States,* 213 U.S. 103 (1909) the Court approved a directed verdict in a civil penalty case.

Lees involved a monetary fine; *Coin and Currency* involved forfeiture of money; *Plymouth Sedan* involved the forfeiture of an automobile, and in each of those cases the Fourth, and Fifth Amendment rights recognized in *Boyd* were held to be invoked for the protection of the individual. *One Lot* involved the forfeiture of precious gem stones and *Helvering v. Mitchell, supra,* involved the payment of a statutory money penalty, but the double jeopardy provision was held not to be invoked in either case.

The nature of the penalty in the five cases is the same —forfeiture of property or money,[34] or the payment of a fine or a penalty—the only distinction among the cases being in the nature of the right asserted. The self-incrimination privilege and the search and seizure right identified in *Boyd* were held invoked; the double jeopardy protection was held not to be invoked by the nature of the penalty involved.

Ward contends that the history of the Fifth Amendment privilege against "self-accusation" as it developed under the English common law in response to the inquisitorial method, and as incorporated in our American common law and legal heritage, and as it found its way into our Constitution, and as it has been interpreted in the case law of the colonies, the state, and the decisions of this Court as recently as 1972, underscores the vitality of and the broad and liberal application to be given to the self-incrimination privilege.

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34. A forfeiture is not limited to tangible property but is also a monetary penalty. 47 U.S.C. 14, and 503.

It should be stressed that Ward is not here arguing the widsom or folly of the administratively imposed civil penalty scheme for oil spills, or for any other particular proscribed behavior. Nor is Ward asking that the self-reporting provisions be struck down; nor would enforcement of the Act or the collection of the penalty be defeated by upholding the judgment of the circuit court. It would still be permissible to assess the penalty based on a discharge of oil under the Act, providing that the evidence used to establish the discharge is derived from a source wholly independent of the compelled disclosure required by 311(b)(5). See *United States v. Mobil Oil Corp.*, 464 F.2d 1124 (5th Cir. 1972); *United States v. Maplewood Poultry Co.*, 327 F.Supp. 686 (D.C. Me. 1971). Moreover, this "use" immunity would be extended only when the owner-operator had given "immediate" notification. *United States v. Ashland Oil and Transp. Co.*, 364 F.Supp. 349, 350 (D.C. Ky. 1973).

Ward is well aware of the justifications put forward in support of administratively imposed civil penalties, such as expediency, the desire to avoid the stigma of a criminal record for often unintentional behavior, and the purported effectiveness of economic deterrence. Ward does not doubt that in many cases the imposition of civil penalties is much more expedient than the prosecution of a criminal case by the Government. But Ward does urge that when the Constitution is sacrificed to expediency, the Courts must act on behalf of the Constitution. *Barker v. Wingo*, 407 U.S. 514 (1972).

In sum, Ward urges that the penalty sought to be imposed here falls clearly within that class of penalties which may be called "quasi-criminal" and which entitle an individual to basic, important, fundamental individual rights guaranteed by the United States Constitution; that

among the most fundamental and basic of all of these rights is the privilege against self-incrimination guaranteed by the Fifth Amendment.

In *Helvering*, this Court undertook to analyze the sanction involved there to determine whether it was remedial (civil) or punitive (criminal). We believe our analysis under Proposition II, *infra*, and the Government's Brief in Chief—not to mention that the three judges of the Court of Appeals, applying the same criteria as the District Court, found diametrically different results—prove that we all recognize: that the test of statutory analysis to determine whether the penalty is one of remedial or punitive purpose is an elusive one and Congressional intent is often ambiguous.[35] Like beauty, the determination is in the eye of the beholder. Indeed, Mr. Justice Frankfurter spoke of "dialectical subtleties" in distinguishing criminal from civil penalties. *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (separate opinion). It is for this reason that we believe the history of the self-incrimination clause is instructive. For hundreds of years, through the English, Colonial, and American experiences, actions to collect penalties or forfeitures have historically been denominated "criminal" or "quasi-criminal" or of such a nature that the protection against self-incrimination has been extended. We ask that the Court reaffirm that historical doctrine today, for it has as much validity in this statutory scheme as it did at the time of the passage of the hated Navigation Acts.

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35. Indeed other courts found Congressional intent under 311(b)(6) ambiguous. *United States v. General Motors Corp.*, 403 F.Supp. 1151, 1158 (D.C. Conn. 1975) and two courts expressed the need for much closer scrutiny of the compelled reporting requirement had the defendant been a non-corporate entity. *United States v. Allied Towing, supra*, 578 F.2d at 980; *United States v. LeBeouf Bros. Towing Co., supra*, 537 F.2d 151-152.

PROPOSITION II:

THE FACTORS ENUNCIATED IN *KENNEDY v. MENDOZA-MARTINEZ* ARE NOT CONTROLLING IN THIS CASE, BECAUSE (1) THE FACTORS WERE NOT DEVELOPED, LISTED ONLY AS DICTUM, (2) THEY WERE NOT RELIED UPON IN THE CASE WHERE THEY WERE DEVELOPED, (3) EMPLOYING THE FACTORS LEADS TO AMBIGUOUS RESULTS. HOWEVER, IF UTILIZED HERE, THEY SUPPORT THE DECISION OF THE COURT BELOW.

The Government's first argument is that Section 311 is designed to be remedial rather than punitive, and hence does not trigger the protections of the Fifth Amendment to the United States Constitution. Yet, a reading of history will demonstrate that the resolution of such an issue as this requires more than bald assertions and familiar labels.

The Government alleges that the Court of Appeals below admitted that the provision in question was remedial in that it helped defray the costs for clean-up of oil spills for which the Government's clean-up costs were not otherwise recoverable. What the Government failed to point out is the additional language of the Court of Appeals immediately subsequent to the language they rely upon.

> "The fact that the civil penalty assessed pursuant to subpart b(6) forms a part of this 'revolving fund' indicates its remedial nature. See (cases cited).
>
> "*However, the statutory language dealing with the automatic assessment and determination of the amount of the penalty indicates a punitive intent.* . . . (T)he factors used in determining the amount of the penalty are not, in our view, reasonably related to the purposes of the revolving fund. Rather, the factors are based upon a retributive and punitive motivation.

> "The civil penalty cannot be characterized as compensatory. . . ." 598 F.2d 1187, at 1191.

Thus, it is clear that the Court below felt that the provisions of the Act in question were of a punitive nature. Indeed, they acknowledged that portions of the statute had as a purpose a remedial aim, but nowhere did they admit that such partial remedial purpose overcomes nor even equals the primary punitive quality of the statute as a whole. The Government admits as much in its Brief. In quoting Senate Report No. 91-351, at page 16, it acknowledges that the penalty in question was also expected to have an impact in *deterring* discharges. At page 18, its deterrent impact is again admitted:

> "The civil penalty was expected to discourage the discharges for which clean-up costs were not likely to be recovered. . . . (T)he civil penalty helps to *prevent harmful spills 'by making care more economical than carelessness.'* " (Emphasis added)

The Government also quotes language from several cases in support of the proposition that the statute in question is remedial and not punitive. For example, *United States v. Tex-Tow, Inc.*, 589 F.2d 1310, 1314-15 (7th Cir. 1978) is cited for the proposition that the statute is remedial. *Tex-Tow, supra,* goes much further. While holding that the statute contains evidence of a remedial purpose, the Court also indicated that it was clear it had a more punitive and deterrent purpose as well.

> "There is also evidence of a remedial purpose to clean up spills once they occur rather than *solely a deterrent purpose*. . . ." (Emphasis added) At 1315

The Government also relies upon *United States v. Marathon Pipeline Co.*, 589 F.2d 1305, 1309 (7th Cir. 1978), to support the remedial rationale of the statute. But the

Court in *Marathon, supra,* again said more than the Government indicates. In particular, it held that, "deterrence is not the *sole* purpose . . ." of the penalty. At 1309 Similarly, in *United States v. General Motors Corp.,* 403 F.Supp. 1151, 1162 (D.C. Conn. 1975), the opinion of the Court evidenced a belief that the statute had a dualistic purpose, both remedial and punitive.

> "The civil penalty provision, when effectively enforced, no doubt *deters* oil discharges. . . ." (Emphasis added) At 1162

Also, in *United States v. Atlantic Richfield Co.,* 429 F.Supp. 830, 841 (E.D. Pa. 1977), aff'd sub nom. *United States v. Gulf Oil Corp.,* 573 F.2d 1303 (3rd Cir. 1978), the Court demonstrated that it felt the statute had more than simply a remedial purpose.

> ". . . it (Congress) has chosen to use economic means - the (b)(6) penalty in order to *deter* spills. . . ." (Emphasis added) At 841

The entire collection of cases that the Government cites in support of the remedial nature of the statute are similarly subject to the same ambiguity. In *United States v. W. B. Enterprises,* 378 F.Supp. 420, 422-23 (S.D. N.Y. 1974), the Court although characterizing the penalty in question as a civil one also said:

> "It appears, therefore, that this section is aimed at *preventing* any discharge, rather than preventing only those discharges not removed." (Emphasis added) At 422

Such rationale, then, supports not simply a remedial statute which would be aimed at preventing discharges that would not be removed. But the Court goes further, directing its provisions at preventing any discharge,

"rather than preventing only those discharges not removed." That type of intent is certainly one that has traditionally been regarded as punitive.

United States v. Eureka Pipeline Co., 401 F.Supp. 934 (N.D. Va. 1975) relied upon by the Government, also can support the punitive as well as remedial nature of the statute. The Court quite frankly admitted the deterrent function of the statute:

> "Language from the Senate Committee which considered the amendments of 1972 indicates that *deterrence was to be one of the results of the penalty* imposed by paragraph (6). The Committee wrote, 'The Committee believes that the discharge of such substances should be subject to a penalty *even though clean up is not practicable.* In this way, each carrier or handler evaluates the *risk* of discharge and determines whether or not potential penalty is worth the risk.' " (Emphasis added) At 939

It seems clear from these cases, as well as the legislative history, that the statute has both remedial and punitive-deterrent characteristics and functions. The Court below recognized this. While recognizing that the statute had some remedial goals, it noted that the manner in which these goals were accomplished indicated more of a punitive criminal intent. For instance, factors that specifically may not be considered in fixing the amount of the penalty, by logic should be, if the statute is remedial. For example, the responsible party's removal effort and expense are not to be considered in fixing the penalty.[36] It seems clear that if the statute's intent is indeed remedial,

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36. The Commandant's Instructions specifically provide that "clean-up" efforts should not be a factor in assessing the penalty. A 40. The Government took the same position in the District Court below. A 36.

an effort by the responsible party to remove the spillage and to expend funds of his own in removing the spillage would enhance the remedial purpose. By contrast, the factors that may be considered in fixing the penalty indicate clearly a criminal intent of the statute in question. Such factors include the degree of culpability associated with the violation, and the amount of oil discharged. By focusing upon the wrongfulness of the act and the prior record of the party, the policy of the act seems focused on the individual liable, rather than upon the act he is responsible for. As the Court below said:

> "This language is lacking in any 'remedial' ring. The costs of investigation are not considered in assessing the amount of the penalty. Similarly, the factors involved in determining the amount of the penalty are not in any way related to what damage may have occurred to the environment by reason of the discharge. See: *United States v. W. B. Enterprises, Inc.*, 378 F. Supp. 420, 422-23 (S.D. N.Y. 1974)." At 1192

Thus, it is clear that not only the statute's provisions on its face reflect both punitive and remedial aspects, the regulations and policies underlying the enforcement of the statute are also open to such contradictory interpretations. It seems clear, then, that a reading of the face of the statute is inconclusive. Moreover, as the cases cited by the Government illustrate, and as the quoted provisions of the legislative history indicate, whether or not the statute is remedial or punitive is not clear. Most likely, it has both remedial and criminal attributes. What is obvious is that the statute cannot simply be characterized one way or the other merely on the basis of its face, or its label. *Trop v. Dulles,* 356 U.S. 86, 94-95.

Since the statute does not clearly on its face indicate whether it is remedial or punitive, the Government urges

resort might be had to the *Mendoza-Martinez* test. Yet, that test has shortcomings in itself. For one, the test was not a majority opinion of this Court, but only a plurality one. Thus, the listing of the factors was dictum. Also, the resolution of *Mendoza-Martinez* itself was not based upon the factors cited in that opinion, but upon an examination into the intent of Congress.

> "We hold §§401(j) and 349(a)(10) invalid because in them Congress has plainly employed the sanction of deprivation of nationality as a punishment—for the offense of leaving and remaining outside the country. . . ." At 165

> "Here, although we are convinced that application of these criteria to the face of the statute (*Mendoza-Martinez* quoted criteria) supports the conclusion that they are punitive, a detailed examination along such lines is unnecessary, because the objective manifestations of Congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive." At 169

Thus, the Court in *Mendoza-Martinez* based its decision on Congressional intent. As we have seen in this case, however, a firm indication of Congressional intent is absent. In such a case, one might look to the *Mendoza-Martinez* factors for guidance, even though it was only a plurality opinion.

It should further be noted that the list did not pretend to be conclusive, nor exclusive. Indeed, one commentator has suggested certain other tests which were and have been applied by this Court in the past in determining whether a statute was penal or regulatory. [Note, 37 Tulane Law Review 831, 833 (1963)].

A further limitation upon applying the seven factors identified in *Mendoza-Martinez* is that the Fifth Amendment self-incrimination privilege has historically been found to demand a more liberal interpretation than other individual rights guarantees contained in the Bill of Rights. *Helvering, supra,* at 400, n.3.

Another limitation on the *Mendoza-Martinez* test is the inconclusive nature of the indicators enumerated by the Court. Several courts applying the indicators to the 1321(b)(6) oil spill penalty provision have come to opposite conclusions based upon application of the same factors. The instant case is, of course, a good example. In *Ward v. Coleman,* 423 F.Supp. 1352 (W.D. Okla. 1976) the District Court, after applying the *Mendoza-Martinez* indicators, concluded that the penalty was civil. The Court of Appeals, applying the same factors, found the penalty to be criminal. *Ward v. Coleman,* 598 F.2d 1187 (1979). In the Fifth Circuit, the District Court found the penalty criminal, while the Fifth Circuit found it to be civil, relying upon *Mendoza-Martinez. United States v. LeBeouf Brothers Towing Co.,* 377 F.Supp. 558 (E.D. La. 1974), rev'd, 537 F.2d 149 (5th Cir. 1976).

Nevertheless, given these limitations, and with the premise that the *Mendoza-Martinez* factors are not conclusive, they are useful in analyzing the various attributes of a particular sanction with a view to determining the more significant effects of the sanction in question.

1. Whether the sanction involves an affirmative disability or restraint.

Despite the Government's contention otherwise, a monetary penalty has also been considered as an affirmative disability. See *Atlas Roofing Co. v. Occupational S. & H. Rev. Com'n.,* 518 F.2d 990, 1001 (1975) aff'd on other

grounds, 430 U.S. 442. Moreover, in *United States v. Futura, Inc.,* 339 F.Supp. 162, 165 (D.C. Fla. 1972), the Court made a similar holding:

> "The sanction which can be imposed does involve an affirmative disability or restraint. The monetary penalty, here a $5,000.00 fine, has traditionally been regarded as a form of criminal punishment."

Indeed, at the time of the oil spill involved in the case at bar, 33 U.S.C. §1321(b)(6) provided for a fine of up to $5,000.00 for each offense. While it is conceded that a monetary penalty may be either a civil or a criminal sanction, i.e., either punitive or regulatory, that fact does not resolve the question so easily. To be sure, the penalty of denationalization has been held to be both punitive and regulatory in nature. Denationalization was found punitive in *Mendoza-Martinez* and in *Trop v. Dulles, supra,* 356 U.S. 86, yet not in *Perez v. Brownell,* 356 U.S. 44 (1958). While a monetary penalty is generally not as great a disability or restraint as prison or expatriation, a potential fine of $5,000.00 at the time of the spill, and, as amended, $50,000.00 or $250,000.00 would certainly be seen as an affirmative disability by almost all upon whom such a fine fell.

Indeed, the Court below correctly recognized that monetary penalties can and do involve the type of affirmative disability or restraint necessary to constitute a criminal penalty:

> "Nevertheless, the imposition of monetary penalties does 'inflict a pocket-book deterrence or restraint on the recipient.'" (*Atlas* cited) At 1193

Yet, even the Court below found little definitive use for criterion 1 of the *Mendoza-Martinez* test in the case

at bar, illustrating the problem with the *Mendoza-Martinez* test in general.

> "Thus, because a sanction is used equally for non-punitive and punitive purposes, it offers little indication as to Congress' intent. Monetary penalties have traditionally been applied to *both criminal and civil statutes.*" (Emphasis added) At 1193

2. Whether the sanction has historically been regarded as punishment.

Despite the Government's assertion that this factor "clearly supports the remedial, non-criminal nature of the civil penalty provision," as we have seen, both the American and English legal experience point to a long history of the existence of the right against self-incrimination in proceedings involving fines, penalties, and forfeitures—regardless of their characterization. Indeed, as was pointed out previously, it was the colonial experience with arbitrary and self-incriminatory commercial laws levelling fines, penalties, and forfeitures that helped lay the foundations for the establishment of the right against self-incrimination in America.

Moreover, this principle has received continued historical support through the 19th and into the 20th century, as our brief previously pointed out. In *United States v. Futura, Inc., supra,* the Court held that a monetary penalty "has traditionally been regarded as a form of criminal punishment." This Court held in *United States v. LaFranka,* 282 U.S. 568, 573 (1931):

> "Admitting that the penalty may be recovered in a civil action, as well as by criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment,

> and its character is not changed by the mode in which it is inflicted, whether by civil action or a criminal prosecution."

In fact, the criminal provision of the 1899 Refuse Act, 33 U.S.C. §411 provides for monetary fines as well as, or as an alternative to, imprisonment for the very same acts for which Ward was punished in this case. Such provision bears out the problems inherent in trying to rigidly adhere to the *Mendoza-Martinez* analysis. As the Court below said:

> "(W)hether it (the sanction) has historically been regarded as punishment. This indicator also gives little indication as to Congress' intent. *Monetary penalties have traditionally been applied to both criminal and civil statutes.*" (Emphasis added) At 1193

Though monetary penalties in general have been historically applied in both criminal and civil statutes, it seems clear that the fine involved here is the type of historic fine, forfeiture, or penalty to which the self-incrimination clause has applied. Thus, history in no way supports the Government's attempt to apply the *Mendoza-Martinez* rationale in its favor, even if that test were always the proper guide. To the contrary, in regards to this particular type of fine, history illustrates exactly the opposite.

3. Whether the sanction comes into play on a finding of scienter.

The Government asserts in its brief that "there is no *scienter* requirement for the imposition of a civil penalty under" 311(b)(6). (Brief in Chief, p. 38) While the terms of the statute mandate assessment of a penalty for each offense, regardless of any finding of *scienter* in the common

law sense, there is an element of *scienter* involved in assessing the fine in accordance with the statutory mandate in consideration of "the gravity of the violation." [33 U.S.C. §1321(b)(6)]. It is clear that the Coast Guard, in interpreting the phrase "gravity of the violation," has used that term to include a consideration of whether or not the discharge was intentional, or the result of gross negligence, and of the degree of culpability of the violator. [Commandant Instruction No. 5922.11A, A 38-40.]

The Government asserts in its Brief that it is irrelevant that the criminal sanctions in the Rivers and Harbors Appropriations Act of 1899 do not contain a *scienter* requirement. Though Ward would agree that it would not be relevant that some unrelated criminal statute did not contain a *scienter* requirement; we do not believe it can be said to be irrelevant that the criminal sanction in the Rivers and Harbors Act, applicable to the identical behavior as involved in the instant case, does not involve *scienter*.

This statute is objectionable precisely because it purports to establish a civil penalty applicable to the identical behavior which is already punishable by a criminal penalty; it compels notification of the behavior to the Government, and automatically imposes the penalty based upon the individual's compelled notification; this Act effectively imposes the same sort of monetary penalty as the criminal monetary penalty provided by the Rivers and Harbors Act at 33 U.S.C. §411, without the necessity and inconvenience of affording procedural safeguards. By the magic of changing labels, the Congress has removed the protection of the Fifth Amendment's Self-Incrimination Clause.

4. Whether the sanction's operation will promote the traditional aims of punishment-retribution and deterrence.

The Government argues that though admittedly the provision in question is deterring, it is of the type of "regulatory deterrence" making it non-criminal.

> ". . ., as noted above . . . Congress expected §311(b)(6) to serve some deterrent function, especially where the oil could not be readily removed." (Government's Brief, p. 41)

The Government, then, contends that the deterrent effect contemplated in *Mendoza-Martinez* must be "more than that which would predictably follow from the assessment of a penalty for a remedial purpose."

Yet it seems clear here that the manner in which the Act was written precludes a reading of it as having a "remedial purpose." To have a remedial purpose, it would be necessary for the Act to stress the repair or the remedying of the damage done to the environment. Yet the Act in question specifically precludes the consideration of "(1) the responsible party's *removal effort or expense*. . . ." A 40

Indeed, the manner in which the penalties are assessed supports the proposition that a fine could be assessed "far in excess of that reasonably related to the remedial purposes . . ." and under the Government's analysis making an "*in terrorem* effect akin to that of being adjudged guilty of a criminal offense." Specifically, the statute provides:

> "In determining the amount of the penalty or the amount agreed upon in compromise, the appropriateness of such penalty to the *size* of the business of the owner or operator charged, the effect on the owner

or operator's ability to continue in the business, and the gravity of the violation shall be considered." 311 (b) (6)

Further, the Commandant's Instructions interpreting and implementing 1321 (b) (6) direct an accounting of the "gravity of the violation, the degree of culpability, and the prior record of the party. . . ." A 39-40

Moreover, Senate Report 91-351, page 3, on the Water Quality Improvement Act, regarding the predecessor of the Act in question, discussed this bill's penalty provision:

> "Frequently, the offenders have made no attempt to clean up the spill and have gone *unpunished.* This bill attempts to correct these deficiencies."

These considerations simply are not relative to any remedial purpose. Moreover, a fine assessed according to the size of the offender, his ability to stay in business, his culpability, and to "punish" him, could easily result in a fine completely out of proportion with the remedial purpose, whether or not the fine is too high or inadequate. Or, in the words of the Court below:

> "In our view, this factor lends considerable weight to a finding that the civil penalty is actually criminal in nature. The statute and the administrative policies adopted pursuant thereto have the effect of *retribution. The penalties are based upon such factors as the gravity of the violation, the degree of culpability, and the prior record of the party.*
>
> "Thus, we conclude that the retributitive aspects of the civil penalty provision weighs heavily in favor of finding the statute penal in nature." At 1193

5. Whether the behavior to which it applies is already a crime.

The Government, in analyzing this factor, downplays the undisputed fact that the Act Ward was convicted under was clearly already a crime. *United States v. White Fuel Corp.*, 498 F.2d 619 (1st Cir. 1974). It argued that such a fact has "little bearing on Congress' intent" in the present case simply because the statute at bar is not triggered upon the finding that a "crime" has been committed, and that that crime is expressly incorporated into the statute.

Such an argument is clearly but another exercise in semantics. Nowhere in any of the cases cited, including *Mendoza-Martinez,* does this Court allude to the necessity of a "nexus" being present within the Government's definition of such. In all of the cases cited by the Government, the issue was simply one of determining the intent of Congress as to whether Congress intended the act in question to be a crime or not. In those cases, the penalty was designated by Congress as a non-criminal sanction, or a tax. In *Lipke v. Lederer,* 259 U.S. 557, 562 (1922); *United States v. LaFranka,* 282 U.S. 568, 572-3 (1931); *United States v. Constantine,* 296 U.S. 287 (1935); the sanction in question was designated as a tax and premised upon the commission of a criminal act. Yet, the Court did not say that a sanction had to be so premised in order to in truth be a crime. The fact that it was in those cases, of course, lent support to the finding by the Court that the tax Congress levied was intended to be a criminal penalty. But no such "nexus" was ever held to be necessary. Cf. *Wisconsin v. Pelican Ins. Co.,* 127 U.S. 265 (1888).

The finding of a "nexus" has no rational relationship to the intent of the test. Whether or not the prior act making Ward's actions here a crime was passed in 1976 or 1776 is irrelevant to the purpose of this component of the

test. In fact, the longer an act has been designated as criminal would seem to lend support to the finding that penalties based upon similar acts are also crimes. As the Court below put it:

> "Whether the behavior to which it applies is already a 'crime.' This factor falls clearly in favor of a finding that the statute is criminal in nature.
>
> "It is therefore clear, that the behavior to which the civil penalty applies is already a crime." At 1193

6. Whether an alternative purpose other than punishment may rationally be ascribed to the sanction.

As previously seen, alternative purposes can arguably be ascribed to the sanction. Indeed, much has been said of the remedial nature of the statute. Yet, the crucial problem with this analysis is that alternative purposes other than punishment may not *rationally* be ascribed to the sanction. That this is true is primarily because the factors involved in determining the penalty have no relationship to any remedial purpose. Although fines assessed for oil spills are paid into a revolving fund, which is utilized according to the statute for clean-up costs where the origin of the spill is undertermined, or for reimbursement to the operator who can establish in the Court of Claims that the oil discharge at issue was caused by an act of God, war, negligence by the United States, or an act or omission of a third party [33 U.S.C. §1321(k), (i), (1), (c) and (d), the amount of the penalty bears no relationship to the cost to the United States in *remedying* the spill.

Although the Government stresses the remedial aspect of paying the penalty monies into the revolving fund under 311(k), it would appear that the actual remedial impact

comes from the provisions providing that a spiller of oil must pay for his own clean-up. Indeed, an operator of an onshore facility who cannot prove the defense of an act of God, war, negligence of the United States, or an act or omission of a third party, is liable for the actual cost of clean-up in an amount not to exceed Fifty Million Dollars, or in an unlimited amount where the discharge is a result of willful negligence or willful misconduct. [33 U.S.C. 1321 (f)(2)]. Thus, the remedial aspect of the act is found in the potential liability for clean-up costs rather than the penalty provision. Indeed, the potential liability for such clean-up costs far exceeds the limitation on the penalty provision.

Moreover, as we have seen, the factors used in determining the amount of the fine are not relevant to any regulatory purpose. Indeed, it is not even permissible to take into account the responsible party's removal effort or expense. (A. p. 40) If indeed the penalty was intended to be remedial, such a factor would be considered. If the goal of the act was to remedy the oil spill, the party's effort in cleaning up his own spill should be highly relevant to determining his fine. Moreover, other factors which may be considered in assessing the fine are equally irrelevant to a regulatory remedial purpose. Such factors as the degree of culpability, the prior record of the responsible party, and the amount of oil discharged clearly are the kind of factors traditionally used in assessing criminal punishment. Also, a consideration of such factors as the size of the business of the owner or operator, the effect on the owner or operator's ability to continue in the business, and the gravity of the violation clearly do not raitonally relate to any regulatory remedial purpose. Rather, they are of the type of consideration traditionally employed in gauging a fine or a punishment in a criminal proceeding. Or, as the Court below said:

"In addition to these factors, the Government urges the penalty can be regarded as compensation to the United States for tortious damage to the environment (cases quoted). We agree that the penalty could be regarded as such compensation, if the factors involved in determining the amount thereof reasonably related to the extent of the damage to the environment. However, as previously noted, the factors are not addressed to this issue. Therefore, we decline to employ the Government's rationale." At 1194

7. Whether the sanction appears excessive in relation to the alternative purpose assigned.

The Government seems to assert that because the penalty in this case was $250.00, the statute does not provide for penalties grossly disproportionate so as to smack of punishment. Moreover, they contend that in the majority of cases even the maximum penalty of $5,000.00 could not be considered excessive. Yet, such is not the case.

As the Court below said:

"Imposition of penalties even in situations where the discharge is accidental, non-negligent and non-intentional, could be excessive. This is especially so, when the operator, in good faith, attempts to clean up, and, in fact, does clean up the discharge on his own initiative. Inasmuch as the amount of the penalty is correlated to the size of the business involved, a large business concern may very well be heavily penalized despite a lack of fault. Any subsequent clean-up operations and attempted removal by the operator would not mitigate this penalty. (Instructions cited). In such a situation, the imposition of a large penalty would be excessive. Thus, we conclude that this indicator leans in favor of the penal nature of the act." At 1194

To be sure, the consideration of this factor must be somewhat speculative. Since the amount of the penalty at the time of the spill ranged from $1.00 to $5,000.00 (and currently from $1.00 to $250,000.00), a literal application of the test to the facts of each case could very well result in a different finding depending upon the size of the fine.

However, an examination of the statutory directive, and of the Coast Guard's interpretation thereof, would seem to indicate a punitive intent. Consideration of "appropriateness of such penalty to the size of the business of the owner or operator charged. . ." would seem to indicate an intent to assess a penalty not in absolute terms based upon the size of the spill, which would be related to a regulatory remedial purpose, but rather on subjective terms, based upon the size of the operator. The intent appears to make the fine large enough to be felt.

There simply is not a reasonable or rational alternative purpose assignable to the penalty. The penalty attaches where the operator is without fault, and where the operator makes a good faith clean-up. Under the statutory directive, a small business and a large business "guilty" of the identical spill, and of the identical clean-up effort, would presumably be fined different amounts, each appropriate to the size of the business. In both cases, the environmental harm which the Government urges would be identical; yet the fine assessed would be tailored to the size of the business in order to assure that the large business paid a fine proportionately large enough to be felt. Thus, it is clear that there is no rational relationship between this fine and the harm to the environment sought to be remedied. Rather, the fine is directed at the individual operator in question and is determined on the basis

of those factors traditionally used in determining criminal punishments and penalties.

The rigorous application of a little wheatfield common sense to the statutory scheme involved here clearly exposes the fundamentally punitive and constitutionally deficient nature of the 1321(b)(6) oil spill penalty.

The Government vigorously contends that the penalty provision is, in fact, regulatory. What the Government fails to account for is the essentially unregulable nature of the activity which invokes the fine. It is not the business of engaging in the handling of oil which invokes the fine—it is the spilling of oil. It is not just the careless spilling of oil, or the negligent spilling of oil, or intentional spilling of oil, which invokes the fine; it is any spill of oil, regardless of fault; in fact, the operator incurs the fine even if he could prove that the oil spill was caused by the acts of third parties which he had done his utmost to prevent. See *United States v. General Motors Corp.*, 403 F.Supp. 1151 (D.C. Conn. 1975), in which General Motors was fined after vandals opened a spigot on a tank, allowing oil to reach navigable waters. The District Court noted that General Motors had taken every reasonable precaution to prevent the exact sort of act which, in fact, caused the spill.

The Government compares Ward's instant case with the situation in *Helvering v. Mitchell*, 303 U.S. 391, where this Court found a 50 percent penalty for failure to pay income tax was a remedial penalty and did not invoke the double jeopardy clause protection after Mitchell had been acquitted on criminal charges of evading income tax. Aside from the fact that the Self-Incrimination Clause was not at issue in *Helvering v. Mitchell, supra*, the behavior there involved was behavior in which Mitchell had

a choice. The fine was imposed for failure to pay income tax due, a shortcoming which Mitchell could have remedied by paying the tax. Mitchell thus had a choice of regulating his behavior to conform to the requirements of the statute, or not, and chose not.

As the trial transcript reveals, Ward here essentially had no choice with regard to the oil spill. The cause of the spill was never determined; it happened and Ward was fined.

The combination of attributes which characterize the oil spill penalty scheme renders clear the constitutional deficiency in this particular statutory penalty.

First and foremost is the fact that the report compelled by 1321(b)(5) under threat of criminal sanction for failure to report is the trigger upon which imposition of the penalty is made by the Coast Guard.

Secondly, the automatic nature of the fine insures that the proscribed act will invoke the fine, regardless of fault. There is, it seems to Ward, something inherently repugnant in a scheme which not only imposes an automatic fine upon absolutely blameless activity, but further compels the victim of the penalty to furnish a detailed report of his misfortune so that he may be appropriately fined. It is akin to requiring a homeowner whose house burns to the ground to file a report with the appropriate clean air agency, under threat of criminal prosecution for failure to do so, so that he may be appropriately fined for polluting the atmosphere with smoke. And, of course, in the case of oil spill, the operator has the additional liability to third parties for any damages caused, together with clean-up liability, together with his direct monetary loss resulting from the spill.

The third determinative element of the statute is its obvious punitive intent. As previously discussed, the Congressional Committee Report indicated a desire to punish oil spillers; the statute itself contains language directing consideration of the size of the business in setting the fine, presumably with a view to insuring that the penalty be appropriately large enough to be felt, although there is further statutory direction to apparently protect the ability of the operator to continue in business.

The fourth distinguishing characteristic of the statutory scheme which compels the conclusion that it is punitive and criminal is the fact that the remedial purposes which the monetary penalty could presumably satisfy are elsewhere provided for in the statute. Other provisions provide for direct liability for clean-up costs, for direct liability to third parties damaged by any oil spills. Since this penalty statute is in addition to the other remedial purposes, it would appear that its only logicial purpose is to punish the oil spiller.

CONCLUSION

The Government has claimed that unless the decision of the Court of Appeals is reversed, the enforcement of the Act and the purpose, therefore, to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" are threatened. We believe this to be an exaggerated claim of statutory impotence. At most, given the facts stated in the Petition for Certiorari (pp. 12-13), the number of operators who are non-corporate and therefore able to claim the protection against self-incrimination will have a relatively insignificant impact upon the Act. The impact, however, upon the Fifth Amendment will be something else; there will be a stunted right against self-incrimination. Already the suggestion has received

favorable consideration that more administrative "civil" penalties" should be assessed.[37] The argument made here by the Government to override the protection of the Fifth Amendment is perhaps superficially persuasive, given the concerns with oil pollution and chemical discharges. Measured against such natural concerns (which Ward shares) the temptation to loosen slightly the protection against self-incrimination is inviting. "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure . . .," *Boyd*, at 641. "This Court has been zealous to safeguard the values that underlie the privilege (against self-incrimination)" *Kastigar v. United States*, 406 U.S. 441, 445 (citing *Boyd*).

There are important values in upholding in this instance the protection against self-incrimination that is coerced by a threat of criminal prosecution for failure to report. The privilege against self-incrimination

> ". . . reflects many of our fundamental values and most noble aspirations . . . our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates a 'fair state-individual balance by requiring . . . the government in its contest with the individual to shoulder the entire load'; our respect for the inviolability of the human

37. The Administrative Conference of the United States has approved the recommendation to broaden the use of administrative civil penalties and at the same time has deplored any additional rule-making procedural safeguards. See 41 U.S. Law Week 2326, and Administrative Conference of the United States, Professor Harvey J. Goldschmid, "An Evaluation of the Present and Potential Uses of Civil Money Penalties as a Sanction by Federal Administrative Agencies." November 1, 1972.

> personality and of the right of each individual 'to a private enclave where he may lead a private life'; our distrust of self deprecatory statements . . . ." *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964)

In light of these policies, imposition of a "civil penalty" against those who give notice of a spill contravenes the privilege against self-incrimination. Requiring a spiller to give the Government the evidence it needs to impose liability serves to eliminate the Government's obligation to carry "the entire load." Indeed, forced notice suggests an "inquisitorial" rather than an "accusatorial" system. Furthermore, such notice appears to invade the "private enclave" by requiring disclosure of activities the Government is attempting to regulate. In view of the established judicial policy of construing the amendment's protections broadly, *Grosso v. United States*, 390 U.S. 62 (1968), the decision of the Court of Appeals should be affirmed. Reversal of that judgment can be supported only by artificial refinements and technicalities which find no support in the self-incrimination clause of the Fifth Amendment. We ask the Court's continued fidelity to the history, meaning, and purpose of the privilege and protection against compelled self-incrimination.

Respectfully submitted,

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